No. 14-181

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In The
Supreme Court of the United States

ALFRED J. GOBEILLE, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE VERMONT GREEN MOUNTAIN CARE BOARD,

Petitioner,

v.

LIBERTY MUTUAL INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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The Solicitor General agrees with petitioner and the *amici* States that this ERISA preemption case raises a question of "national importance." U.S. Br. 9. The Solicitor General also agrees that the Second Circuit had "no sound basis" for its holding that Vermont's all-payer claims database statute is preempted as applied to self-funded ERISA plans. *Id.* at 15. And the Solicitor General recognizes the value of all-payer claims databases, the unique role of the States in building these programs, and the federal government's own encouragement and support for state databases. These factors all demonstrate the need for this Court's immediate review.

The Solicitor General's caution and suggestion that the Court allow time for further percolation should not deter the Court from granting certiorari to review the Second Circuit's seriously flawed application of ERISA preemption. A wait-and-see approach harms the States' substantial interest in adopting health care policies that best serve the needs of their citizens. At least eleven States have similar databases in place and several more, including New York and Connecticut, are implementing these programs. Amicus Br. N.Y. et al. 1-2 & n.1. As health care costs continue to skyrocket and place enormous pressures on state budgets, the States have an urgent need to take advantage of the "great potential," U.S. Br. 21, offered by all-payer claims databases.

The Solicitor General squarely rejects Liberty Mutual's jurisdictional argument and offers little discussion of the benefits of delaying review. But the

States have much to lose if the Second Circuit's expansive view of ERISA preemption – which departs substantially from this Court's precedents – is left standing. The Court should grant the petition.

I. The Solicitor General agrees with Vermont and the *amici* States that this question of ERISA preemption has national importance and that the Second Circuit erred in holding Vermont's statute preempted.

A. As the Solicitor General explains, "the question presented . . . has substantial importance to the Nation's healthcare system." U.S. Br. 23. The "States are uniquely positioned to improve quality of care and to control costs through the collection and publication of claims data." *Id.* at 22. Indeed, the Solicitor General supports Vermont and the *amici* States on key points that confirm the importance of all-payer claims databases:

- The "development of state healthcare claims databases has great potential to improve healthcare outcomes nationally." U.S. Br. 21; *see* Pet. 26-31 (addressing potential of databases to reduce costs, improve quality of care, and promote transparency); Amicus Br. N.Y. et al. 4-7 (databases "help to promote efficient and effective health care").

- Contrary to Liberty Mutual's assertions (Opp. 30-31), these databases "will be

significantly less comprehensive and thus not as useful in developing health policy" absent data from self-insured ERISA plans. U.S. Br. 22; *see* Amicus Br. N.Y. et al. 7 (explaining that Second Circuit's ruling would "create significant and serious gaps" in claims data because self-funded plans cover "a large and distinctive subpopulation"); Pet. Reply 3-5.

- All-payer claims databases are critical for evaluating new health care models for payment and service delivery. *See* U.S. Br. 22 ("it is essential to the accuracy of some evaluations to be able to analyze state-level databases that include all payer claims"); Pet. 5-6 (Board "relies on the data for oversight and evaluation of health care payment and delivery system reforms").

- Because the federal government "recogniz[es] the importance of access to comprehensive claims data," it provides Medicare claims data to Vermont and other states. U.S. Br. 22 (citing 42 U.S.C. § 1395kk); *id.* at 17-18 n.7 (noting that CMS provides Medicare claims data to Vermont).

The Solicitor General's filing shows, as Vermont has argued, that the Second Circuit's ruling "treads on both state and *federal* interests." Pet. 15. Programs encouraged, supported, and funded by the federal government rely on comprehensive all-payer claims databases. U.S. Br. 9, 21-23. State interest in

creating databases also continues to grow. *See, e.g.*, APCD Council, *Model All-Payer Claims Database (APCD) Legislation*, at 2 (May 2015) ("an ever-growing number of states are implementing All-Payer Claims Databases (APCDs), aggregating claims and administrative data from public and private payers statewide").[1] This issue of "national importance," U.S. Br. 9, warrants review by this Court.

B. The Solicitor General agrees that Vermont's database statute and regulation are not preempted by ERISA and the "court of appeals was wrong" to conclude otherwise. U.S. Br. 17.

First, and crucially, the Solicitor General recognizes that "the Vermont reporting requirements" have "an entirely different focus" from ERISA's financial and actuarial reporting requirements. U.S. Br. 13; *see* 29 U.S.C. § 1023. Vermont's all-payer claims database is a tool for evaluating and improving health care outcomes and policies. *See* Vt. Stat. Ann. tit. 18, §§ 9401(a), 9410(a)(1). Vermont seeks de-identified claims data as part of its oversight of the health care system – a traditional state function. *See N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995) (Congress did not intend to "displace general health care regulation, which historically has been a matter of local concern."). The State is not regulating or seeking

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[1] Available at: http://apcdcouncil.org/sites/apcdcouncil.org/files/Model%20APCD%20Legislation_FINAL_0.pdf.

information about plan financing, governance, or the relationship between the plan and its members. The database statute thus has "nothing to do with ERISA's principal concerns with the soundness of plans" or the plans' "federal-law obligation to pay promised benefits." U.S. Br. 14-15; *see Cal. Div. Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316, 326-27 (1997) (ERISA reporting, disclosure, and fiduciary requirements adopted to protect against poor management by plan administrator); *see also* Pet. App. 38 (Straub, J., dissenting) (purpose of ERISA's reporting requirements is "wholly distinct" from Vermont's law).

Second, the Solicitor General agrees that the "mere fact that a state-law reporting obligation encompasses information about the operation of an ERISA plan does not suffice for preemption." U.S. Br. 14. Instead of starting with the presumption against preemption of state laws regulating health care, *see* Pet. App. 18 n.8, the panel majority below presumed instead that a state law involving "plan record-keeping, and filing with a third party" intrudes on a core area of ERISA concern. Pet. App. 23-24. The Solicitor General corrects this flawed view of ERISA preemption. *See* U.S. Br. 14-15.

Third, the Solicitor General, like the dissenting judge below, finds no basis in this record to hold that Vermont's law is preempted. U.S. Br. 15-16. The relevant inquiry is whether Vermont's law "interfere[s] with the way in which the plan is administered," and there is no showing "that the

requirements here have such an effect." *Id.* at 16-17. Regardless, Liberty Mutual's assertion, and the panel's unsubstantiated conclusion, that Vermont's law is burdensome lack factual support. *Id.* at 13, 16-17, 19.

II. The Solicitor General agrees that the Chair is the proper party to seek review in this Court.

The Solicitor General recognizes that the petition was filed by the proper party to defend Vermont's statute, the Chair of the Green Mountain Care Board. U.S. Br. 9-11. The original defendant in this case, the commissioner of a different state agency, no longer enforces the database statute and regulation. *See* Pet. App. 92-99; Pet. Reply App. 25-34. The permanent declaratory and injunctive relief that Liberty Mutual seeks, Pet. Reply App. 16-17, would now "run against the Chair." U.S. Br. 10. That suffices to show that the party substitution was appropriate. *See* Pet. Reply 9-13.

Although this Court could deem the petition to include a motion to substitute the Chair as a party, *see* U.S. Br. 11 n.6, no motion is required under Supreme Court Rule 35.3 or the analogous civil and appellate rules. *See* Fed. R. App. P. 43(c); Fed. R. Civ. P. 25(d). Even Liberty Mutual acknowledges the longstanding view that a transfer of "relevant enforcement responsibilities" between offices makes the transferee a successor in office under these rules.

Opp. 11 n.4 (citing Wright et al., *Federal Practice and Procedure* § 1960, at 715 & n.6 (3d ed. 1997)); *see* Pet. Reply 11 (citing cases); *see also Indep. U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 910-11 n.1 (D.C. Cir. 1982) (recognizing substitution under Fed. R. Civ. P. 25(d) where authority was transferred from Secretary of Commerce to Secretary of Transportation). The Board Chair was automatically substituted as the defendant by operation of Fed. R. App. P. 43(c) on July 1, 2013, when the state law transferring authority to the Board took effect. 2013 Vt. Acts & Resolves, No. 79, sec. 40; *id.* sec. 53(h).

III. Given the States' pressing need to address health care costs, quality, and access, the Court should not wait for a decision from another circuit.

After acknowledging the Second Circuit's erroneous application of ERISA preemption and the "substantial importance" of the question presented, the Solicitor General nonetheless recommends "further percolation" for an undefined period of time. U.S. Br. 23. State governments cannot afford the luxury of "percolation." Health care costs continue to escalate at hyperinflationary rates while legislatures attempt to balance budgets and human services agencies strive to ensure adequate access to care. The Court should grant review and decide this important question now.

Although the Solicitor General does not see a "square conflict" here, U.S. Br. 20, his unambiguous conclusion that the Second Circuit was "wrong" in finding preemption, *id.* at 17, underscores the panel's significant misapplication of this Court's precedent. Moreover, the Solicitor General's brief does not address the lower court's failure to apply the presumption against preemption of state law, which the dissenting judge below described as "fl[ying] in the face of clear Supreme Court precedent." Pet. App. 33 (Straub, J., dissenting). And the Sixth Circuit pointedly agreed with Judge Straub that the panel majority's "literal approach to preemption" disregards "'the case law's focus on whether the *administration of benefits to beneficiaries* is impacted.'" *Self-Ins. Inst. of America, Inc. v. Snyder ("SIIA")*, 761 F.3d 631, 639 (6th Cir. 2014) (quoting Pet. App. 33 (Straub, J., dissenting)), *petition for cert. filed*, 83 U.S.L.W. 3560 (U.S. Dec. 18, 2014) (Nos. 14-741, 14A373). Even if *SIIA* does not directly conflict with the decision below, the Sixth Circuit's rejoinder to its sister circuit confirms that the panel majority departed substantially from the principles set forth in this Court's ERISA precedents. *See generally* Pet. 15-25. A direct conflict is not a prerequisite for reviewing a question of "substantial" and "national" importance, U.S. Br. 9, 23, especially where, as here, the lower court has misapplied this Court's holdings.

In any event, the Solicitor General's one-paragraph discussion of the benefits of percolation offers little reason for delaying review. *See* U.S. Br.

23. The brief does not point to any other pending cases that would serve as a better vehicle. The Solicitor General briefly suggests that "additional appellate decisions" may supply "more information to assess the impact" of similar laws on ERISA plans. *Id.* Yet in this case Liberty Mutual, on its own motion for summary judgment, was unable to produce any evidence that Vermont's database law burdened plan administration. Pet. App. 72-73 n.5. There is no reason to think that Liberty Mutual, a sophisticated litigant represented by experienced counsel, inadvertently neglected to supply relevant evidence on this point. Rather, the absence of evidence in the record below confirms that providing claims data to state databases has little or no impact on ERISA plans. *See* Pet. App. 43-44, 46 (Straub, J., dissenting); U.S. Br. 16.

In fact, there is little benefit to postponing review, while delay undermines the States' substantial interest in developing health care databases and using them to inform health care policy. At least sixteen States, including all three states in the Second Circuit, already have or are developing health care databases similar to Vermont's. Amicus Br. N.Y. et al. 1-2 & n.3.[2] These States *and the federal*

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[2] A current survey shows twelve states with all-payer claims databases in place and six states with databases in development, bringing the total to eighteen. APCD Council, *Interactive State Map*, http://apcdcouncil.org/state/map (last visited May 29, 2015).

government have invested substantial resources to create these programs. *See id.* at 3 (describing New York's $10 million investment and Connecticut's $6.5 million federal grant). The Solicitor General agrees with Vermont and the *amici* States that databases without data from self-insured ERISA plans will be "significantly less comprehensive and thus not as useful in developing health policy at both the state and national levels." U.S. Br. 22-23; *see* Amicus Br. N.Y. et al. 3 ("The usefulness of an all-payer claims database comes principally from its comprehensiveness."). States should not be forced to make do with incomplete data and lose the full value of their investments while waiting, perhaps for years, for another case to work its way through the system.

Indeed, evidence-based reform supported by all-payer claims databases is a vital tool in the national effort to contain health care costs while improving quality and access to care. States are rapidly developing claims databases because analysis of this information yields powerful insights. *See, e.g.*, Network for Excellence in Health Innovation, *All Payer Claims Databases: Unlocking the Potential*, at 1 (Dec. 2014) (all-payer claims databases "are now providing unprecedented research and policy opportunities for improving the health care delivery system").[3] As the Solicitor General's brief acknowledges, the federal government itself is funding "development and

[3] Available at: http://www.milbank.org/uploads/documents/reports/All-Payer-Claims-Databases-Unlocking-the-Potential.pdf.

testing of new healthcare payment and service-delivery models" that "rely on state data-collection efforts for evaluation." U.S. Br. 21. Building accurate, comprehensive databases, and using that data to guide policy, is work that needs to be done, and done as soon as possible. The Second Circuit's decision in this case is a roadblock to effective reform that only this Court can remove.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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